Supreme Court, U.S.
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No. 91-1892

In The

Supreme Court of the United States

October Term, 1992

PETER RUBEN,

Petitioner,

v.

HOME PORT RENTALS, INC.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the finding by the District Court that it had personal jurisdiction of Peter Ruben thereby denying him due process of law?

2. Did the Court of Appeals err in affirming the refusal of the District Court to vacate the default judgment under Rule 60(b) Fed.R.Civ.P. entered against Peter Ruben and in not finding that its failure to do so was an abuse of discretion?

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ARGUMENT

QUESTION 1: BECAUSE THE DISTRICT COURT DID NOT HAVE PERSONAL JURISDICTION OF PETER RUBEN, THE COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT AGAINST HIM.

A. Purported service on Harper was not service on Ruben because Harper had not been authorized nor designated by Ruben as his agent for service of process.

In its brief Home Port asserts that "common sense and logic dictate the conclusion" that Ruben and Allen authorized Harper as their agent for service of process on them. (Respondent's Brief p. 8) Ruben did not sign the Consent Order or any Order or statement or document or power of attorney wherein Harper became his agent, nor has he ever acknowledged Harper as his agent for service of process. The fact that Harper signed the Consent Order prepared by counsel for Home Port wherein Harper was designated as the agent for service of process on the defendants, provided the process is served within 180 days of the date of the Order, is the sole premise upon which Home Port's contention rests. Under this contention, the declarations of the agent establish agency. This is not the law. It would be a frightening prospect if a self-professing agent could establish agency without the knowledge or awareness of the purported principal.

> The law is clear in this state that statements made by an agent concerning the existence or extent of his authority are insufficient standing alone to establish agency. *Clippel v. Mid-Carolina Oil, Inc.*, 303 S.C. 127, 399 S.E.2d 163, 165 (S.C.App. 1990); *Fuller v. Eastern Fire & Casualty*

Insurance Company, 240 S.C. 75, 124 S.E.2d 602 (1962); *City of Greenville v. Washington American League Baseball Clubs,* 205 S.C. 495, 32 S.E.2d 777 (1945).

There was nothing in the file of Harper reflecting any exchange wherein Harper was designated as agent for service of process for Allen or Ruben. There is no evidence from Harper that he was so designated by Allen or Ruben. The *only* evidence on this point are the Affidavits of Ruben and Allen. They are unequivocal in stating that no such agency existed. (App. pp. A-103; A-126; A-135) No Affidavit from Harper or anyone else challenges these facts.

A power of attorney issued by a surety company to an agent of a bonding company to bind it on criminal recognizance bonds, did not make the bonding company agent the agent of the surety company for purposes of service of process upon the surety company in an action on the bonds. *Anderson County v. Indiana Lumbermens Mutual Insurance Company,* 404 S.C. 363, 404 S.E.2d 718 (S.C.App. 1991). The same is true of an attorney employed to defend a civil action. There is no implied authority for him to accept service of process in a new action against the client.

Apparently recognizing the absence of any evidentiary support for its contention that Harper was authorized as agent for service of process by Ruben or Allen, Home Port alleges in its brief (Respondent's Brief. p. 10) that "Harper had discussed the specific terms of the Consent Order with Mr. Allen." That did not occur. The only evidence on it is from Allen that no such discussion occurred. (App. p. A-126) Home Port alleges in its brief that Harper sent a copy of the Consent Order dated November 4, 1987 to the defendants with Harper's letter

of November 3, 1987 to Allen because that letter reflects that there was an enclosure to it. (Respondent's Brief p. 7, p. 10, p. 22, p. 23 and p. 35) This is more than misleading. The Harper letter of November 3, 1987 to Allen does not enclose an Order. It says: (App. p. A-37)

> Also enclosed please find our bill for services rendered in the matter.

The enclosure was Harper's bill. Home Port converts this obvious fact into an untruth by asserting that the enclosure to this letter was a copy of the Consent Order. The letter of November 3, 1987 was *before* the Order of November 4, 1987 had been signed. There is no mention in this letter of any consent Order or the terms of any dismissal other than that a suit could be brought again. The source of the mis-information upon which Home Port relies for its accusation that a copy of the Consent Order was sent to Allen has roots in the memorandum of Harper and his statement to the Court in connection with his motion to be relieved as counsel. In Harper's August 1, 1988 memorandum in support of his motion to withdraw his appearance on behalf of the defendants, is the following: (App. p. A-63)

> 1. That, pursuant to Consent Order *filed November 4, 1987.* F. Mikell Harper agreed to accept service for the Defendants, and Defendants were fully aware of said Consent Order and the fact that a new proceeding was being instituted in said Court.[1] (Emphasis added.)

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[1] Harper corrected this misstatement at the hearing on August 25, 1988 (App. p. A-77) and in his Affidavit of January 16, 1991 (App. pp. A-138 – A-139)

At the hearing on Harper's motion to withdraw his appearance, on August 25, 1988, in the recitation of his activity in the matter, Harper stated to the Court (App. p. A-67):

> I mailed those pleadings or that Order, that Consent Order to Mr. Allen, and together *with a letter* explaining to him that this matter was ended. They did have leave to bring it again within 180 days.
>
> I considered that my representation of him had been completed at that point, and that we were on an even basis, and *that was that.* (Emphasis added.)

The letter referred to by Harper in his statement to the Court was his letter of November 3, 1987 to Allen. (App. p. A-37) That letter did not contain a copy of the Consent Order.

It is significant to note that the same paragraph of Harper's memorandum of August 1, 1988, quoted above (App. p. A-63), upon which Home Port relies for its allegation that Harper sent a copy of the Consent Order to Allen also reflects that Harper's understanding of the effective date of the Consent Order of November 4, 1987 was that it was "filed November 4, 1987." Home Port seeks to ignore that obvious fact.

It is to be remembered that in connection with his motion to withdraw as counsel for the defendants, Harper was acting on behalf of Harper and not on behalf of the defendants. In that role he was, in effect, an adversary. His statements were to serve the interests of Harper, not those of Ruben. Although Harper's memorandum of August 1, 1988 States that the defendants were aware of the fact that a new proceeding was being instituted, he

recanted that statement at the hearing on August 25, 1988 (App. p. A-77) and in his Affidavit of January 16, 1991 (App. p. A-139). Home Port asserts in its brief that "Harper testified that a copy of the Consent Order was enclosed with the November 3, 1987 letter." (Respondent's Brief p. 22) Harper did not "testify." Harper was not under oath. Perjury was not a risk. Harper made a statement to the Court and submitted a memorandum, discussed above, both of which contained untrue statements. The statement of counsel, particularly in a self-serving role, is not evidence.

> If counsel possibly made oral statements to the judge, factual in nature, which served as a basis for his ruling, we can only say that argument of counsel is not a substitute for evidence. *Brown v. Johnson*, 276 S.C. 68, 275 S.E.2d 876, 878 (1981); *Lloyd v. Walters*, 276 S.C. 223, 277 S.E.2d 888, 889 (1981) (Affirmation by cross examining attorney may not be considered as evidence.)

The only *evidence* is in the Affidavits of Ruben and Allen that Harper was not designated as their agent for service of process. (App. pp. A-103; A-126; A-135) The only *evidence* as to non-receipt by Allen of a copy of the Consent Order of November 4, 1987 is the Affidavit of Allen. (App. p. A-126) There was no communication at any time between Ruben and Harper. (App. pp. A-104; A-116; A-139) There is no *evidentiary* challenge to these facts by Home Port. Home Port has created facts from concatenated inferences which are without evidentiary support in an effort to obscure the facts.

At the time of the hearing of his motion to be relieved as counsel on August 25, 1988, Harper stated: (App. p. A-67)

> I consider that my representation of him [Allen] had been completed at that point [Harper's letter of November 3, 1987] and that we were on an even basis, and *that was that.* (Emphasis added.)

If that was the understanding of Harper at the time he wrote his November 3, 1987 letter to Allen, how could Allen and Ruben have a different understanding as to what might later occur? They could not. "That was that." It was over. Harper said, "This matter was ended." (App. p. A-67)

In his Affidavit of January 16, 1991 (App. pp. A-138 – A-139), Harper did not challenge nor controvert the facts in the Affidavits of Allen and Ruben although Harper's Affidavit is three and one-half months later.

The significance of the absence of notice to Ruben cannot be over emphasized. Without notice there cannot be due process. All that occurred thereafter in connection with the 1988 lawsuit did not give notice to Ruben until he received the default judgment in April 1989. The Affidavits of Ruben, Allen and Harper confirm that Ruben and Allen did not receive a copy of the 1988 suit papers nor notice of the suit. (App. pp. A-104; A-111; A-126; A-136).

QUESTION 2: THE REFUSAL OF THE DISTRICT COURT TO VACATE THE DEFAULT JUDGMENT AGAINST PETER RUBEN UNDER RULE 60(b) FED.R.CIV.P. WAS AN ABUSE OF DISCRETION AND THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT.

A. Excusable neglect was clearly established under Rule 60(b)(1) and entitlement to relief under Rule 60(b)(6) Fed.R.Civ.P. was established and the Court of Appeals erred in affirming the District Court's denial of relief.

Home Port devotes much attention to the delay by attorney Chastain in filing a Motion to Vacate the Default Judgment as being attributable to Ruben. In the Order of the District Court, denying the Ruben Motion to Vacate the Judgment dated July 17, 1990 (App. p. A-20), the Court held that Ruben did not act with due diligence (App. p. A-23). However, in the Order of the District Court denying the Ruben motion for reconsideration, dated April 25, 1991 (App. p. A-27), the Court again addressed this point and, based upon the factual showing that the delay was not attributable to Ruben, stated clearly that "the Court does view differently," Ruben's actions following awareness of the default judgment against him. It then cited the controlling law[2] that "when the party is blameless and the attorney is at fault, the former interests control and a default judgment should ordinarily be set aside." (App. p. A-30) In its opinion the

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[2] *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corporation*, 843 F.2d 808, 811 (4th Cir. 1988); *United States v. Moradi*, 673 F.2d 725 (4th Cir. 1982).

Court of Appeals noted that the District Court "concluded that Ruben could not be faulted for the delay in his motion." (App. p. A-6) Accordingly, Home Port's treatment of this in its brief has no relevance.

Home Port alleges that denial of relief from the default was justified because: of "uncooperative behavior" and the defendants' "failure to cooperate in discovery matters" (Respondent's Brief p. 2, p. 4, p. 26); of their "dilatory behavior" (Respondent's Brief p. 3, p. 4); Ruben "intentionally evaded contacts from the Court and Mr. Harper" (Respondent's Brief p. 12); and the defendants did not "appear at the appropriate times for discovery, trial dates, or hearings." (Respondent's Brief p. 29)

There is no evidence that there was any discovery that Ruben refused to respond to. There is nothing to indicate any discovery was scheduled. The record establishes without question that every mailing from Harper and the Court after the 1988 action was instituted was returned to the sender. Nothing reached Ruben. Yet he is accused of failing to respond and failing to cooperate in a legal proceeding of which he had no notice. Harper did not mail the 1988 suit papers to Ruben at his address in Florida. Harper did not send the 1988 suit papers to Allen at the address of International at 302 Lewis Lane, Dania, Florida. (App. p. A-34) He sent them to the new address of Adventurent in Ft. Lauderdale, Florida, Suite 106, 5450 NW, 33rd Avenue, Ft. Lauderdale, Florida (App. pp. A-133 – A-134). At the time Harper mailed his May 25, 1988 letter to Allen at the Adventurent address in Ft. Lauderdale, Florida, Harper knew it was not a current address for Allen because in his letter Harper requested that Allen give him his new address and phone number. (App. p. A-60) At the time of Harper's May 25, 1988 letter

to Allen, Ruben was still living at his address of 581 Lake Dasha Boulevard, Plantation, Florida. (App. p. A-105)

Home Port alleges in its brief that Ruben was "evasive," as to service of process. A peculiar aspect of this accusation is that on the very *first* mailing after the default judgment was entered, it reached Ruben, because it was mailed to the old address of International in Dania, Florida and was mis-delivered next door to a person who knew Ruben and who forwarded it to him. Once the judgment was obtained there was no difficultly in locating Ruben. It immediately raises the question of whether the asserted efforts at giving Ruben notice *before* the default judgment were as straightforward as claimed. The statement of Home Port's counsel at the hearing on August 25, 1988 before the District Court is revealing (App. p. A-74):

> Mr. Corbin: I believe it would be more fruitful in trying to find the assets than trying to find the defendants at this point, Your Honor, if we did have a judgment.

Stated otherwise, the remark of counsel was to the effect "give us a judgment and we will then find the defendants." This is exactly what happened. If the same endeavor had been pursued in giving Ruben notice *before* the default judgment as was given after the default judgment he would have received notice. Publishing a Rule to Show Cause in a Florida newspaper to give notice to a California resident cannot qualify as notice under the due process provisions of the constitution.

Relief under Rule 60(b) is:

> " * * * To be liberally construed in order to provide relief from the onerous consequences of defaults and default judgments. * * * Any doubts about whether relief should be granted should

be resolved in favor of setting aside the default. * * * *"

* * *

In short, any considerations of the need "to expedite cases, to fully utilize the court's time, to reduce overcrowded calendars and to establish finality of judgments * * * should never be used to thwart the objectives of the blind goddess" of justice itself. *Compton v. Alton Steamship Company,* 608 F.2d 96, 102 (4th Cir. 1979) [citing *Tolson v. Hodge,* 411 F.2d 123, 130 (4th Cir. 1969) and *Boughner v. Secretary of Health Ed. and Welf., U.S.,* 572 F.2d 976, 978 (3rd Cir. 1978).].

CONCLUSION

Peter Ruben was never served with process. For this reason the District Court did not have personal jurisdiction of him. Peter Ruben has been denied notice of the claim against him and an opportunity to be heard. For this reason he has been denied due process of law under the Constitution. The Petition for Certiorari should be granted.

All of which is respectfully submitted.

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